CONNECTICUT TRIAL LAWYERS ASSOCIATION

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Raised Bill 1030
Public Hearing: 3-20-09

TO: MEMBERS OF THE JUDICIARY COMMITTEE
FROM: CONNECTICUT TRIAL LAWYERS ASSOCIATION (CTLA)
DATE: MARCH 20, 2009

RE: OPPOSITION TO RAISED BILL 1030

The Connecticut Trial Lawyer's Association ("CTLA") respectfully opposes Raised Bill Number 1030, "An Act Concerning the Apportionment of Liability After a Claim is Withdrawn". The CTLA respectfully submits that this proposed legislation creates an unjust and unworkable procedural scheme, forces plaintiffs to unwillingly litigate claims of weak liability, thereby fostering marginal and costly litigation, and lastly serves to abrogate the plaintiff's absolute right to withdraw a claim against any party prior to the commencement of evidence as permitted by Connecticut General Statute § 52-80.

I. **Background – Applicable Statutes and Relevant Caselaw**

A. *C.G.S. § 52-572h*

Historically, Connecticut adhered to the common law doctrine of joint and several liability. Pursuant to that doctrine, any defendant could be held liable for the entirety of the damages claimed by the plaintiff, regardless of the percentage of fault attributed to that defendant.

As part of the "Tort Reform" legislation of 1986 and 1987, Connecticut adopted the doctrine of proportionality by enacting Connecticut General Statute § 52-572h. That statute requires a jury, at the conclusion of a trial, to determine each defendant's percentage of negligence for the damages claimed. Significantly, negligence can only be apportioned to parties to the action, or to "settled or released persons". A jury is not entitled to apportion any percentage of negligence to a party against whom the plaintiff has withdrawn, or against a person who is not a party to the action.

These apportionment provisions were adopted in 1987 as part of the Tort Reform II legislation which was passed to remedy the unworkable consequences of the Tort Reform I legislation. Under Tort Reform I, liability was apportioned to all persons, even persons who were not a party to the action. The undesired practical effect of Tort Reform I was that plaintiffs were required to unwillingly litigate claims of weak liability against any potentially culpable party, thereby fostering marginal and costly litigation in our courts. The current apportionment statute, as amended by the Tort Reform II legislation, corrected these unintended consequences by limiting apportionment to only parties and settled and released persons.

B. *C.G.S. § 52-80*

Also relevant to the issues at hand is Connecticut General Statute § 52-80. Connecticut General Statute § 52-80 affords to the plaintiff an unfettered and absolute right to withdraw any claim against any defendant at any time in the action, provided that it is withdrawn before the commencement of a hearing on the merits.

C. *C.G.S. § 52-102b*

The Connecticut General Statutes and the Connecticut Practice Book also provide significant procedural mechanisms to the defendant for purposes of ensuring the doctrine of proportionality. First, pursuant to the apportionment statute, C.G.S. § 52-102b, a defendant may add a person to an action, not named in the original Complaint, by filing an Apportionment Complaint against that person within 120 days of the plaintiff's return date. That person, who is then referred to as an apportionment defendant, is a party for all purposes, including apportionment purposes under § 52-572h.

D. *Viera v. Cohen, et al., 283 Conn. 412 (2006)*

Lastly, in the recent case of *Viera v. Cohen*, 283 Conn. 412 (2006), the Connecticut Supreme Court confirmed that a party against whom the plaintiff has withdrawn does not constitute a party for purposes of apportionment. Likewise, the party against whom the plaintiff has withdrawn does not constitute a settled or released person, as said terms are used within Connecticut General Statute § 52-572h. Accordingly, a jury is not permitted to apportion liability to a party against whom the plaintiff has withdrawn.

II. **Discussion**

A. *The proposed legislation resurrects the unworkable consequences of Tort Reform I, forcing plaintiffs to unwillingly pursue marginal litigation, and preventing withdrawals of claims against non-culpable defendants.*

In order to properly protect the interests of a victim injured by the negligence or wrongdoing of another, an attorney frequently is required to name several defendants at the commencement of the action in order to ensure that no rights are lost through the expiration of the statute of limitations. As the attorney conducts discovery, the factual circumstances underlying the claim are clarified and defined, and a determination is made as to which of the original defendants are the culpable parties. At this juncture, the attorney has an ethical obligation to release the defendants whom he or she believes are not liable by withdrawing the Complaint as to those defendants. In this regard, litigation is streamlined, and parties are released from litigation, thereby limiting defense costs, shortening jury selection and trials, and reducing the burden on our Courts.

In the *Viera* case cited above, the plaintiff had initially brought suit against three groups of defendants. The plaintiff withdrew the action as to Waterbury Hospital several months before trial. Likewise, the plaintiff withdrew as to the defendant Cohen more than a month before the commencement of trial. Thus, at the time of trial, there was only one defendant. This is a typical example of a medical malpractice case which was originated against three defendants, but where only one defendant was ultimately present at the time of trial.

The proposed legislation would force a plaintiff to keep all defendants in the litigation through the time of trial. The plaintiff could not withdraw against a defendant for fear that a jury would apportion liability to a withdrawn defendant, thereby preventing the victim from receiving full compensation for his injuries. Many actions, such as medical malpractice actions, can involve several weeks of jury selection, as well as several weeks of evidence, leading to the regrettable conclusion that a marginal defendant would be required to incur extensive litigation costs, even where the plaintiff does not want to pursue the litigation against that defendant. This result would be a consequence of the proposed legislation, if defendants were allowed to apportion liability to defendants against whom the plaintiff had withdrawn.

B. *A better alternative solution is to permit defendants to file cross complaints for apportionment.*

The problem identified by the Court in *Viera* was a gap in the current procedural scheme that allows a defendant to implead a party believed to be a cause of the plaintiff's injuries and damage within 120 days of the return date, or to file a notice of intent to seek apportionment against a settled or released person, but does not allow a defendant to claim apportionment against a codefendant. Thus, if plaintiff withdraws against that codefendant more than 120 days after the return date, the defendant has no procedural mechanism to seek apportionment of that former codefendant's liability. The simple solution to this problem is to provide a procedural mechanism for the defendant to file a cross complaint for apportionment against a codefendant. Then, if the plaintiff withdraws against that codefendant without settlement or release, the cross claim remains intact and the defendant can present evidence and the jury can apportion liability to the former codefendant. A proposed amendment to section 52-102b which fulfills this objective is attached hereto.

The attached proposal avoids the pitfall of requiring the plaintiff to maintain an action against a marginally liable defendant for fear of apportionment preventing full compensation. If a defendant believes that a codefendant is liable, the defendant would be permitted to assert and maintain those claims regardless of any subsequent action by the plaintiff. However, if no cross claim was asserted, then the plaintiff would be able to withdraw against a defendant without risking apportionment to that defendant. The plaintiff and defendant are both protected by this fix to the *Viera* problem, without creating the unintended negative consequences of preventing withdrawal of unnecessary defendants from the litigation.

If a defendant believes that a codefendant is liable for all or part of the plaintiff's injuries, such a claim should be asserted so that all parties are placed on notice of those claims. Under the present proposal in Raised Bill 1030, the defendant can lay a trap for the plaintiff by remaining silent about these claims until after a codefendant has been withdrawn, and then sandbag the plaintiff by seeking apportionment to reduce the plaintiff's recovery. A fairer solution that protects all of the parties is to allow defendants to file a cross complaint if they intend to assert a claim of apportionment, thereby protecting themselves against the consequences of a withdrawal and protecting the plaintiff from being ambushed at trial.

III. Conclusion

In conclusion, for all of the foregoing reasons, the CTLA respectfully submits that the proposed legislation creates more problems than it solves, and should not be passed. The *Viera* concern can be easily and effectively remedied by allowing defendants to file cross claims for apportionment against existing codefendants. This solution encourages the withdrawal of claims against marginally liable defendants, thus promoting efficiency of the judicial process. It protects defendants by filling the gap identified in *Viera,* while protecting plaintiffs from being deprived of the ability to obtain full compensation because of a last minute claim of apportionment by a defendant.

WE RESPECTFULLY URGE YOU TO DEFEAT RAISED BILL1030. Thank you.

CONN. GEN. STAT. § 52-102B

TITLE 52 CIVIL ACTIONS
CHAPTER 898 PLEADING

Conn. Gen. Stat. § 52-102b (2008)

§ 52-102b. Addition of person as defendant for apportionment of liability purposes.

(a) A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. Any such writ, summons and complaint, hereinafter called the apportionment complaint, shall be served within one hundred twenty days of the return date specified in the plaintiff's original complaint. The defendant filing an apportionment complaint shall serve a copy of such apportionment complaint on all parties to the original action in accordance with the rules of practice of the Superior Court on or before the return date specified in the apportionment complaint. The person upon whom the apportionment complaint is served, hereinafter called the apportionment defendant, shall be a party for all purposes, including all purposes under section 52-572h.

(b) The apportionment complaint shall be equivalent in all respects to an original writ, summons and complaint, except that it shall include the docket number assigned to the original action and no new entry fee shall be imposed. The apportionment defendant shall have available to him all remedies available to an original defendant including the right to assert defenses, set-offs or counterclaims against any party. If the apportionment complaint is served within the time period specified in subsection (a) of this section, no statute of limitation or repose shall be a defense or bar to such claim for apportionment, except that, if the action against the defendant who instituted the apportionment complaint pursuant to subsection (a) of this section is subject to such a defense or bar, the apportionment defendant may plead such a defense or bar to any claim brought by the plaintiff directly against the apportionment defendant pursuant to subsection (d) of this section.

New (c) A defendant in any civil action to which section 52-572h applies may file a cross complaint for apportionment against any codefendant asserting a claim that the codefendant's negligence was a proximate cause of the plaintiff's injuries or damage. Any defendant who has filed a cross complaint against a codefendant may seek apportionment as to that codefendant pursuant to section 52-572h, even if the plaintiff subsequently files a withdrawal as to that codefendant.

(d) No person who is immune from liability shall be made an apportionment defendant nor shall such person's liability be considered for apportionment purposes pursuant to section 52-572h. If a defendant claims that the negligence of any person, who was not made a party to the action, was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released the plaintiff's claims against such person, then a defendant may cause such person's liability to be apportioned by filing a notice specifically identifying such person by name and last known address and the fact that the plaintiff's claims against such person have been settled or released. Such notice shall also set forth the factual basis of the defendant's claim that the

negligence of such person was a proximate cause of the plaintiff's injuries or damages. No such notice shall be required if such person with whom the plaintiff settled or whom the plaintiff released was previously a party to the action.

(e) Notwithstanding any applicable statute of limitation or repose, the plaintiff may, within sixty days of the return date of the apportionment complaint served pursuant to subsection (a) of this section, assert any claim against the apportionment defendant arising out of the transaction or occurrence that is the subject matter of the original complaint.

(f) When a counterclaim is asserted against a plaintiff, he may cause a person not a party to the action to be brought in as an apportionment defendant under circumstances which under this section would entitle a defendant to do so.

(g) This section shall be the exclusive means by which a defendant may add a person who is or may be liable pursuant to section 52-572h for a proportionate share of the plaintiff's damages as a party to the action.

(h) In no event shall any proportionate share of negligence determined pursuant to subsection (f) of section 52-572h attributable to an apportionment defendant against whom the plaintiff did not assert a claim be reallocated under subsection (g) of said section. Such proportionate share of negligence shall, however, be included in or added to the combined negligence of the person or persons against whom the plaintiff seeks recovery, including persons with whom the plaintiff settled or whom the plaintiff released under subsection (n) of section 52-572h, when comparing any negligence of the plaintiff to other parties and persons under subsection (b) of said section.